Beh Lee Liang v Chew Sah Suak & Anor

HIGH COURT (TAIPING) — ORIGINATING SUMMONS NOS 24-88-94 AND 24-89-94
ABDUL MALIK ISHAK J
6 JUNE 1995

Civil Procedure *— Originating summons — Summary possession of land — Disputes of fact and law — Whether case could be treated as if started by way of writ*

Land Law *— Summary possession — Rights of present occupier vis a vis registered proprietor — Forfeiture of land to state government — Previous occupier held land on temporary occupation licence — Death of temporary occupation licence holder — Expenditure on renovations — Whether expenditure gave any rights to present occupier*

Land Law *— Licence — Estoppel — Defendant's father occupied premises on temporary occupation licence — Expenditure on premises — Death of defendant's father — Whether defendant had right to remain in occupation*

Equity *— Estoppel — Whether registered proprietor estopped from taking possession of land — Previous occupier held land on temporary occupation licence — Expenditure on land — Death of temporary occupation licence holder — Whether representation or encouragement made by plaintiff to occupier to occupy or renovate premises*

These proceedings began as summary proceedings for possession of land under O 89 r 1 of the Rules of the High Court 1980. They were ordered to be jointly heard and at the hearing, were ordered to be continued as if begun by writ.

The plaintiff became the registered proprietor of two pieces of land, each with a shophouse on it, in 1993. The plaintiff said in the 1920s his late grandfather, Beng Ah Ai, was the registered owner but he had let his brother, Beng Ah Teng, stay in the shophouses and run the family business from there and his widow managed it after he died until 1947. The plaintiff said after that his father had care of the shophouses and he allowed the defendant's father to occupy them and run a business there. The defendant's father failed to pay the quit rent and the two pieces of land on which the shophouses stood reverted back to the state government. He obtained temporary occupation licences (TOL) from 1954 to 1989. There was evidence that the plaintiff's father was adopted by Beng Ah Teng but did not appear in the tombstone of his widow. There was also evidence from Beng Ah Teng's son that he had adopted the plaintiff as he had no son, although he continued to live with his father. The defendant said he had lived at the two shophouses for 40 years and his father had repaired them. His father died in April 1988 after which he sought the transfer of the TOL to himself but found they were registered in the plaintiff's name. He relied on equitable estoppel, claiming his father had

spent money renovating the premises with the encouragement of the plaintiff's father and that he had renovated the properties in 1993. A

Held, allowing the application:

(1) Although commenced by originating summonses, since there were disputed questions of fact and law, the cases should continue as if begun by writ. Examination and cross-examination of witnesses to be conducted as provided under O 28 r 8(1) of the Rules of the High Court. B

(2) Beh Ah Ai was the plaintiff's grandfather. The plaintiff's name appeared on the gravestone of Beh Ah Teng's widow. It was not known why it was there and was an exception to the general rule, according to expert evidence on Chinese customs. C

(3) The defendant could not rely on the principle of equitable estoppel against the plaintiff as there was no representation or encouragement by the plaintiff to the defendant either to occupy the shophouses or to renovate them. D

(4) Forfeiture of land by the state government gave the plaintiff an option to apply for them. When the land was registered in his name in 1993, any dependent interest created by the plaintiff or claimed by the defendant through the plaintiff came to an end. E

(5) From 1993 the defendant occupied the premises as a squatter. He could not as such seek compensation for the money spent on renovation.

(6) Assuming that the defendant was a licensee, service of the originating summonses to the defendant was sufficient notice of termination of the licence. F

(7) With the death of the defendant's father, the temporary occupation licence died with him. The licence was personal to the holder. G

(8) There was no fraud by the plaintiff when he registered as the owner. The defendant was a squatter and he had no rights to be cheated of.

[Bahasa Malaysia summary H

Prosiding-prosiding ini bermula sebagai prosiding terus untuk pemilikan tanah di bawah A 89 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980. Mereka telah diarahkan didengar bersama dan di pendengaran, mereka diarahkan supaya diteruskan seandaikan telah dimulakan melalui writ.

Plaintif telah menjadi tuanpunya berdaftar dua bidang tanah, setiapnya dengan sebuah rumah kedai padanya, dalam tahun 1993. Plaintif berkata bahawa dalam tahun dua puluhan, mendiang datuknya, Beng Ah Ai, adalah tuanpunya berdaftar tetapi beliau I

telah membenarkan adiknya, Beng Ah Teng, tinggal di dalam rumah kedai itu dan menjalankan perniagaan keluarga dari sana dan balunya telah menguruskan perniagaan itu selepas kematiannya pada 1947. Plaintif berkata bahawa selepas itu bapanya mempunyai jagaan rumah kedai itu dan beliau membenarkan bapa defendan menduduki mereka dan menjalankan satu perniagaan di sana. Bapa defendan gagal membayar cukai tanah dan dua bidang tanah itu yang di atasnya rumah kedai itu didirikan kembali kepada kerajaan negeri. Beliau memperolehi lesen penghunian sementara (LPS) dari 1954 hingga 1989. Terdapat keterangan bahawa bapa plaintif telah diambil angkat oleh Beng Ah Teng tetapi ini tidak kelihatan pada batu nisan balunya. Juga terdapat keterangan dari anak lelaki Beng Ah Teng bahawa beliau telah mengambil angkat plaintif kerana beliau tidak ada anak lelaki, walaupun beliau terus tinggal dengan bapanya. Defendan berkata bahawa beliau telah menetap di kedua rumah kedai itu untuk 40 tahun dan bapanyalah yang telah membaiki rumah itu. Bapanya meninggal pada April 1988 dan selepas itu beliau telah memohon pemindahan LPS kepada dirinya sendiri tetapi telah mendapati bahawa mereka didaftar dalam nama plaintif. Beliau bergantung pada estopel ekuiti, katanya bapanya telah membelanjakan wang mengubahsuai premis itu dengan galakan bapa plaintif dan bahawa beliau telah mengubahsuai hartanah itu dalam tahun 1993.

Diputuskan, membenarkan permohonan itu:

(1) Walaupun telah dimulakan melalui saman pemula, oleh kerana terdapat soalan fakta dan undang-undang yang dipertikaikan, tindakan-tindakan ini patut diteruskan seperti dimulakan dengan writ. Pemeriksaan dan pemeriksaan balas saksi-saksi patut dijalankan seperti diperuntukkan di bawah A 28 k 8(1) Kaedah-Kaedah Mahkamah Tinggi 1980.

(2) Beh Ah Ai adalah datuk plaintif. Nama plaintif boleh dilihat pada batu nisan balu Beh Ah Teng. Tidaklah diketahui kenapa ianya terdapat di sana dan adalah satu kecualian kepada aturan am, mengikut keterangan pakar tentang adat Cina.

(3) Defendan tidak boleh bergantung kepada prinsip estopel ekuiti terhadap plaintif kerana tidak terdapat representasi atau galakan oleh plaintif kepada defendan sama ada untuk menduduki rumah kedai itu atau untuk mengubahsuai mereka.

(4) Perlucuthakan tanah oleh kerajaan negeri memberikan plaintif opsyen untuk memohon untuk mereka. Apabila tanah itu didaftar di dalam namanya dalam tahun 1993, apa-apa kepentingan tanggungan yang dibentuk oleh plaintif atau dituntut oleh defendan melalui plaintif berakhir.

(5) Dari tahun 1993 defendan menduduki premis itu sebagai setinggan. Oleh itu beliau tidak boleh menuntut pampasan untuk wang yang dibelanjakan atas pengubahsuaian.

(6) Andaikan yang defendan adalah seorang pemegang lesen, penyampaian saman pemula itu kepada defendan adalah notis yang mencukupi untuk menamatkan lesen itu.

(7) Dengan kematian bapa defendan, lesen penghunian sementara pun mati bersamanya. Lesen itu adalah untuk diri pemegangnya sahaja.

(8) Tidak terdapat fraud oleh plaintif apabila beliau mendaftar diri sebagai tuanpunya. Defendan adalah setinggan dan beliau tidak ada hak yang boleh diperdayakan.]

Notes

For cases on originating summons, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2334–2351.

For cases on summary possession of land, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3521–3525.

For cases on estoppel, see 6 *Mallal's Digest* (4th Ed) paras 1452–1461.

For a case on expenditure on land, see 8 *Mallal's Digest* (4th Ed) para 1657.

For other cases on licences and equitable estoppel, see 8 *Mallal's Digest* (4th Ed), paras 1490–1492.

Cases referred to

Abdul Majid v Haji Abdul Razak [1971] 2 MLJ 228 (refd)

Bahr v Nicolay (1988) 78 ALR 1 (folld)

Central Excise Dept v Somasundaram [1980] Cr LJ 533 (refd)

Chalmers v Pardoe [1963] 1 WLR 677; [1963] 3 All ER 552 (distd)

Fels v Knowles 26 NZLR 604 (refd)

Foong Gun Mooi v Lim Yeok Soon [1978] 1 MLJ 218 (refd)

Haji Mohd Ekramul Haq v State of West Bengal 1959 AIR 488 SC; (1959) (Supp) 1 SCR 992; (1959) SCJ 443 (refd)

Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 404 (folld)

Inwards & Ors v Baker [1965] 2 QB 29; [1965] 2 WLR 212; [1965] 1 All ER 446 (distd)

Majlis Amanah Rakyat v Tam Seek Hong & Ors [1994] 2 AMR 1296 (refd)

Muldowney v Illinois CRR Co 36 Iowa 472 (refd)

National Land Finance Corp Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 220 (folld)

Ng Wan Siew v Teoh Sin [1963] MLJ 103 (folld)

Palaniswamy v State [1968] Cr LJ 453; 1968 AIR 127 Bom; 68 Bom LR 941; (1967) Mah LJ 25; (1968) Jab LJ 610 (refd)

Papoo v Veeriah [1965] MLJ 127 (folld)

Paruvathy d/o Murugiah v Krishnan s/o Doraisamy [1983] 2 MLJ 121 (distd)

Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd [1988] 3 MLJ 54 (folld)

Pesuruhjaya Ibu Kota, Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ (refd)
Pillai & Anor v Indufela Co & Ors [1980] 2 MLJ 176 (refd)
Pooran Das v State of Rajasthan [1982] WLN (UC) 60 (refd)
Prem Shanker v State [1957] Cr LJ 108; (1957) 2 Lab LJ 177 (refd)
Raj Kishore v State [1969] Cr LJ 860; 1969 AIR 321 Cal (refd)
Ram Prasad v State of Rajasthan [1982] WLN (UC) 69 (refd)
Ramsden v Dyson [1866–67] LR 1 HL 129 (distd)
Rosman @ Osman bin Haji Abdul Rashid v Rosmah Begum bte Bahadur Beg [1993] 1 AMR 919 (distd)
Seng Chong Metal Works Ltd v Lew Fa [1966] 2 MLJ 63 (refd)
Scott & English (M) Sdn Bhd v Yek Toh Ming [1985] 1 MLJ 451 (refd)
Shamsudin v Yap Choh Teh & Anor [1969] 1 MLJ 26 (refd)
Sidek bin Haji Muhamad & Ors v Government of Perak [1982] 1 MLJ 313 (folld)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81 (refd)
Tan Liang Hong v Min Ngai Knitting Factory (M) Ltd & Anor [1974] 1 MLJ 76 (refd)
Teh Bee v K Maruthamuthu [1977] 2 MLJ 7 (folld)
Waimiha Sawmilling Co v Waione Timber Co [1926] AC 101 (refd)
Yeoh Cheng Han v Official Administrator [1972] 2 MLJ 7 (refd)

Legislation referred to

National Land Code ss 68, 340(1)
Rules of the High Court 1980 O 12 rr 1(2), 8, O 28 r 8(1), O 89 r 1

Faizal Helmi Zamri (*WY Chan & Roy*) for the plaintiff.
Gregory Chan Weng Keong, SY Chia and *Harinder Kaur Veriam* (*Paul Ong & Associates*) for the defendants.

Abdul Malik Ishak J: The parties sought for joinder of these two originating summonses and when the cases came up for hearing, Encik Faizal Helmi Zamri, the learned counsel for both the plaintiffs in these two cases, rightly argued that since the second defendant in Originating Summons No 24–88–94(T) failed to enter an appearance, then judgment in default of appearance ought to be entered against them. It seems that the Originating Summons No 24–88–94(T) had been served on the second defendant by way of an AR registered card which was duly returned on 24 May 1994 (see exhibit marked 'LLC5' in the affidavit of Lee Lai Chun that was affirmed on 31 May 1994 as per encl 6) and, on the basis of these grounds, Encik Faizal urged me to enter final judgment against the second defendant. To go back to basic principles, an entry of an appearance is said to be the first step which any defendant should take to submit to the jurisdiction of the court and, consequently, shows his intention to defend the matter. As a body corporate for instance, it

may not enter an appearance in the action or defend it otherwise than by a solicitor (see O 12 r 1(2) of the Rules of the High Court ('RHC')). In *Tan Liang Hong v Min Ngai Knitting Factory (M) Ltd & Anor* [1974] 1 MLJ 76, the principles that a solicitor must act with the authority of the defendant and that mere instruction by the defendants' insurers will not validate the entry of a appearance were put to the fore. But what is certain is this. When counsel appears in court and states that he is instructed that will be enough and the court will not go to an extreme of inquiring into his authority to appear (*Scott & English (M) Sdn Bhd v Yek Toh Ming* [1985] 1 MLJ 451). Here, in so far as the second defendant in Originating Summons No 24–88–94(T) was concerned, the situations as set out above did not materialize for him in that there was no entry of an appearance under O 12 r 8 of the RHC nor was there counsel in attendance acting on their behalf. I have no choice but to enter judgment against the second defendant in Originating Summons No 24–88–94(T). To date, no appeal was lodged by the second defendant and I reckon they realised their own folly.

That disposes of the second defendant in Originating Summons No 24–88–94(T).

Now, in so far as these two cases were concerned, it begun as summary proceedings for possession of land under O 89 r 1 of the RHC. Cik Harinder Kaur Veeriah, who initially acted for both the defendants in these two cases, and later during the trial proper Encik Gregory Chan Weng Keong assisted by Cik SY Chia led the defence for both the defendants (namely, Chew Sah Suak @ Chew Sar San — 'defendant'), strenuously argued and pointed out that there were triable issues and urged the court to decline the prayers sought for, whereas Encik Faizal argued to the contrary and pointed to some salient points that were in favour of both the plaintiffs in these two cases (namely, Beh Lee Liang — 'plaintiff'). On the strength of O 28 r 8(1) of the RHC, I ordered that these two cases commenced by originating summonses be continued as if begun by writ and I too ordered that all affidavits filed therein for these two cases (encls 2 (filed in support of encl 3), 12, 15 and 24 in Originating Summons No 24–88–94(T)) and (encls 3 (filed in support of encl 2), 11, 13 and 16 in Originating Summons No 24–88–94(T)) to stand as pleadings. An early trial to enable witnesses to be called and be cross-examined was also ordered by me. At this juncture, I must say that those cases where it was decided that where there were disputed questions of fact and law the actions should be by way of writs and not by originating summonses did not give effect to O 28 r 8(1) of the RHC. For instance, in *Pesuruhjaya Ibu Kota, Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ where the applicant commenced an action by way of originating summons and the respondent argued that the procedure adopted was wrong because disputed questions of fact and law were involved, HRH Raja Azlan Shah J (as HRH then was) in erudite terms observed:

> I now come to the question of procedure. The respondents contend that the action should have proceeded by way of writ and not originating

A summons because disputed questions of fact and law are involved. When a question of fact is at issue action is to be by way of writ and not by originating summons. This is because the facts have to be established by examination and cross-examination of witnesses.

Salleh Abas CJ (Malaya) (as his Lordship then was) adopted a more B flexible approach in *National Land Finance Corp Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 220. The respondents and the appellants there by a sale and purchase agreement had agreed to buy certain immovable property subject to the approval of the Foreign Investment Committee. The respondent contended that the agreement became void when the Foreign Investment Committee refused to approve the sale. The trial C judge held the agreement became void and the appellants appealed to the Federal Court. The appellants objected to the respondents taking the proceedings by way of an originating summons instead of by way of a writ. On these facts, his Lordship Salleh Abas CJ (Malaya) (as he then was) observed succinctly:

D Counsel for the appellants objected to the respondents taking the proceedings by an originating summons instead of by a writ. He argued that there are matters of credibility of witnesses and issues of facts which could only be decided by oral evidence instead of by sworn affidavits. With respect we disagree with the submission. The issue involved in this case is purely a matter of construction of the sale and purchase agreement E between the parties. No other evidence is needed to determine the issue than the massive correspondence that passed between them and their solicitors. We think that the learned judge was right in holding that the issue can be decided on the basis of the documents exhibited in court together with the undisputed facts disclosed and that there are no issues relevant to the case which require evidence to be called at a trial. We F would further add that there is nothing to prevent the appellants from cross-examining Haji Ahmad Roose bin Haji Mohd Ali if they were not happy with his affidavits. In this case the appellants surely had the opportunity to cross-examine him, but they did not avail themselves of it and let this opportunity to pass by. We are therefore of the view that the procedural objection raised by the appellants had no substance.

G In 1963, Thomson J in *Ng Wan Siew v Teoh Sin* [1963] MLJ 103 in an illuminating judgment said this:

Before departing from the case I should make one observation. I would have made it earlier had it not been of academic interest as far as this case is concerned by reason of the order as to costs made in the court below. H It is to the effect that these proceedings should have been started by writ and not by originating summons. Theoretically they could have been started either by writ or by originating summons but it has been said again and again that when it is known there is going to be conflict of testimony and a necessity for taking parol evidence the proceedings should be commenced by writ and a plaintiff if successful may be deprived I of any additional costs caused by his having commenced proceedings by way of originating summons.

The court in *Abdul Majid v Haji Abdul Razak* [1971] 2 MLJ 228, adopted a strict approach and refused to decide question of facts on an

originating summons. It was held that where evidence need be led through witnesses, then the originating summons was not a suitable process for the adjudication of the issues raised. A

Though the defendant argued through his counsel that these two cases should have commenced as writs and not as originating summonses, yet both parties were quite happy that these proceedings though grounded on originating summonses be tried through examination and cross-examination of witnesses as provided for under O 28 r 8(1) of the RHC. B

In the course of the trial, the following facts emerged.

The plaintiff testified that he became the registered proprietors of two pieces of lands comprised in HS(D) LM 5266, PT No 115, bandar Matang, in the district of Larut and Matang, Negeri Perak Darul Ridzuan (see exh (P1) and hereinafter referred to as 'LM 5266') and another comprised in HS(D) LM 5267, PT No 116, bandar Matang, in the district of Larut and Matang, Negeri Perak Darul Ridzuan (see exh (P2) and hereinafter referred to as 'LM 5267') on 14 December 1993. Shophouses stood on these two pieces of lands. On LM 5266, a shophouse was erected thereon and the premises was known as No 29, Jalan Cina, 34570 Matang, Perak. On LM 5267, a shophouse with an address No 30, Jalan Cina, 34570 Matang, Perak stood therein. The plaintiff testified further and narrated the events that led him to own these two shophouses. C D E

It was said that the plaintiff's late grandfather by the name of Beh Ah Ai was the registered owners of these two shophouses. Beh Ah Ai did not stay in these two shophouses during his life time but was magnanimous enough to let his brother by the name of Beh Ah Teng to stay and run the family sundry business there. Beh Ah Ai died in the country and not in China on 30 August 1927 (see exhs 'P4A' and 'P4B') whereas Beh Ah Teng died in 1933. After the death of Beh Ah Teng, Madam Ng Ah Poi @ Ng Siang Kim took charge of the two shophouses and continued to run the family sundry business. It was in evidence that Madam Ng Ah Pio @ Ng Siang Kim was the widow of Beh Ah Teng and she ran that family business until 1947 when circumstances forced her to wind up the business and she left Matang and stayed in Taiping. According to the plaintiff the family business did not go bankrupt but it simply closed up. Thus, after 1947 no family business was carried out in these two shophouses. According to the plaintiff, after 1947 his late father had the care of these two shophouses but unfortunately his late father did not continue with the family business there. Instead, the plaintiff's late father, sometime in 1949 or 1950, gave permission to the defendant's father to occupy the two shop houses. The defendant's father utilised these two shophouses to repair outward motorboat engines. It was said that it was the defendant's father that requested for permission to use the two shophouses and the plaintiff's late father gave that permission. No rentals were ever collected from the defendant's father for occupying the two shophouses. F G H I

A The plaintiff testified that both his parents who have since died used to stay at premises no 29, Jalan Cina, 34570 Matang, Perak and that he himself was born there in 1939 and stayed there until 1945 or 1946 when they then moved to the shophouse number 28 next door. In 1951 when the plaintiff and his family moved to Taiping, the plaintiff testified that the defendant's father was still running his motorboat business at the two shophouses.

It was also part and parcel of the plaintiff's case that when the plaintiff's late father allowed the defendant's father to occupy the two shophouses, the latter was supposed to pay the necessary quit rents but defaulted and eventually the two pieces of lands wherein the two shophouses stood reverted back to the state government. Under cross-examination, it was established that the plaintiff's late father was adopted by Beh Ah Teng as his own son. It was further established that the name of the plaintiff's late father — Beh Heng Kah @ Beh Choon Seng — did not appear in the tombstone of Madam Ng Ah Poi @ Ng Siang Kim (see exhs 'D10' and 'D10A').

Beng Choon Chooi (SP2) was the plaintiff's next witness. He testified that he was also known as Beh Heng Beng and that he knew the plaintiff since he used to stay at Jalan Cina. He said that he knew the plaintiff's father whose name was Beh Heng Kah @ Beh Choon Seng. Of pertinence, this witness said that he is the son of Beh Ah Teng and that Madam Ng Ah Poi @ Ng Siang Kim was his mother. He was shown the photograph of his mother's tombstone and he was able to identify it with ease. He testified that he could read Chinese characters and that at column 10 of his mother's tombstone his name 'Heng Meng' appeared therein. At column 13 of his mother's tombstone he testified that the plaintiff's name appeared therein as 'Lee Liang'. He testified that the plaintiff was not his blood brother and sought to explain that he adopted the plaintiff as his own son because he had no son of his own and that he only had a daughter. Of pertinence too is his evidence that the plaintiff's grandfather is Beh Ah Ai and not Beh Ah Teng. Under cross-examination, this witness testified that he adopted the plaintiff when the plaintiff was between 13 to 14 years old and that the plaintiff stayed with his own father. This witness was categorical when he said that: 'Orang cina mesti dapatkan anak lelaki sebab itulah saya ambil Beh Lee Liang sebagai anak angkat saya.' In a lighter vein, this witness said: 'Saya sayang Beh Lee Liang.'

The defendant testified that currently he stayed at the two shophouses and he had been there for the last 40 years. He said that he stayed there with his family members and that his father by the name of Chew Kim Guan had stayed there since 1954. He testified that the shophouses were old and that his father had repaired those shophouses to enable them to stay there and that his father had applied to the relevant authority to stay there. He said that since 1954 his father had paid the quit rents and he produced illegible documents marked as 'IDD8' being 1954 quit rent and 'IDD9' being 1955 quit rent. He too introduced quit rent for 1965 (see 'IDD11'). The defendant testified

further that his father obtained temporary occupation licences ('TOL') for the years 1954 till 1989 to the two pieces of lands wherein the two shophouses stood. He then produced TOLs for the years 1976 (two of them and marked as 'D12A' and 'D12B'), 1977 (also two of them and marked as 'D12C' and 'D12D'), 1978 (two of them and marked as 'D12E' and 'D12F'), 1980 (two of them and marked as 'D12G' and 'D12H'), 1982 (two of them and marked as 'D12I' and 'D12J'), 1983 (two of them and marked as 'D12K' and 'D12L'), 1984 (two of them and marked as 'D12M' and 'D12N'), 1985 ('D12O'), 1986 ('D12P'), 1987 ('D12Q' and 'D12R'), 1988 ('D12S' and 'D12T') and for 1989 (two of them and marked as 'D12U' and 'D12V'). He said that his father died on 7 April 1988. He introduced evidence that by letter dated 22 September 1988 (exh 'D13') he wrote to the Pentadbir Tanah Daerah, Larut dan Matang, Taiping and sought for the transfer of the TOLs from that of his father to himself in regard to the two pieces of lands wherein the two shophouses stood. He said that in mid-1989 when he went to the land office to pay the assessment he was shocked to learn that the two pieces of lands wherein the two shophouses stood had been registered in the name of the plaintiff. This prompted him to send letters of complaints to the various government departments, namely:

(1) the Yang Di Pertua Majlis Daerah Taiping dated 12 March 1990 (exh 'D15');

(2) the Ketua Pengarah, Pejabat Tanah Perak dated 23 February 1990 (exh 'D16');

(3) the Pegawai Daerah, Larut and Matang, Taiping dated 23 March 1990 (exh 'D17');

(4) the Pengarah, Biro Pengaduan Awam dated 23 March 1990 (exh 'D17B');

(5) the Yang Di Pertua, Majlis Perbandaran Taiping dated 18 April 1990 (exh 'D18A');

(6) the exco member of the state of Perak dated 18 April 1990 (exh 'D18B');

(7) the Pentadbir Tanah Daerah, Larut and Matang, Taiping dated 18 April 1990 (exh 'D18C');

(8) the Pengarah, Biro Pencegah Rasuah Ipoh, Perak dated 28 May 1990 (exh 'D19A');

(9) the Ketua Setiausaha Negara, Biro Pengaduan Awam, Kuala Lumpur dated 28 May 1990 (exh 'D19B');

(10) the Pentadbir Tanah Daerah, Larut and Matang, Taiping dated 3 July 1990 (exh 'D20'); and

(11) the member of Parliament, Biro Pengaduan Awam dated 11 April 1992 (exh 'D21').

The defendant further testified that his late father applied for the titles to the two pieces of lands wherein the two shophouses stood on 30 June

A 1986 (exh 'D26') and for convenience that letter was worded thus:

> Tuan Pentadbir Tanah Daerah,
> Larut, Matang dan Selama, Taiping.
>
> Tuan,
>
B Per: Permohonan geran kekal tanah TOL
>
> Adalah dengan hormatnya dimaklumkan berhubung dengan perkara di atas, saya berharap tuan dapat memberi kelulusan tuan.
>
> 2 Borang-borang permohonan disertakan. Rujukan borang permohonan ialah 3877/86, 3878/86 dan 3879/86.
>
C
> 3 Bersama-sama ini disertakan money order bernilai RM60 untuk bayaran pendaftaran.
>
> Sekian, terima kasih.
>
> Yang benar,
>
D sgd (Chinese character)
>
> (Chew Kim Guan)

Unfortunately, the relevant forms as adverted to in para 2 of 'D26' were not produced as exhibits and one is left guessing whether it related to
E the same two pieces of lands wherein the two shophouses stood or it referred to some other lands. Attempts were made by the defendant to rely on 'IDD27', a document dated 23 May 1994 from the Pejabat Daerah dan Tanah, Larut dan Matang, Taiping addressed to Chew Kim Guan of no 30, China Street, Matang wherein it adverted to a letter dated 13 June 1975 to drive home the points that Chew Kim
F Guan applied for the land on 13 June 1975 and that the land office took that long a time to convey the message that the applicant Chew Kim Guan was unsuccessful in his land application. Again, a perusal of 'IDD27' shows insufficient information as to whether it relates to the same two pieces of lands under dispute and this, incidentally, appears
G to be the view of Encik Ahmad Zakil bin Wahab (SD5), the Penolong Pegawai Daerah Tanah Taiping. Encik Ahmad Zakil asserted that 'IDD27' appeared to be a computer print out and the signature therein was not his. Under cross-examination, the defendant stated that he knew that LM 5266 was forfeited by the state government on 29 November 1950 and that LM 5267 was forfeited by the state government
H in June 1951 through his late father. He agreed that since these two pieces of lands had been forfeited by the state government, his late father merely applied for TOLs for these lands. The defendant stated that the TOL that was issued in 1954 was in the name of his late father who died on 7 April 1988. He admitted that the TOLs to the two pieces of lands were not in his name. Of pertinence, under cross-examination,
I it was established that the TOLs as per 'D12U' and 'D12V' issued on 9 January 1989 were issued in the name of the defendant's father even though on that date his late father had already died. This was certainly a damning piece of evidence as the death of the defendant's father on

17 April 1988 brought to an end the TOL (see s 68 of the National Land Code). The defendant stated that his late father had repaired both the shophouses and that he himself sometime in mid-1993 had renovated the premises. He disagreed that he knew that when he renovated both the shophouses in mid-1993, the two pieces of lands wherein both the shophouses were built had been alienated to the plaintiff. He agreed that the words 'Hak Milik' appearing in exhs 'D15' and 'D17B' referred to TOLs. Finally, under re-examination, the defendant asserted that he had stayed in both the shophouses for more than 40 years and he considered it his home. He was perturbed at the change of events and that made him send all those letters of complaints. He again stated that he had repaired the shophouses and that his late father had told him that the two pieces of lands wherein both the shophouses stood belonged to Beh Ah Ai.

The tombstone maker of 30 years standing by the name of Woon Tham Teck (SD2) was the defendant's next witness. This witness testified that it was he who built the tombstone for Madam Ng Ah Poi @ Ng Siang Kim as reflected in the photograph 'D10'. He stated that before Madam Ng Ah Poi @ Ng Siang Kim died she had commissioned for the building of the tombstone and engraving the particulars found on it. He stated that Madam Ng Ah Poi @ Ng Siang Kim showed him the specifications and gave him the writings that should be inscribed on the tombstone. Of pertinence, he testified that once the tombstone had been prepared by him, he had shown it to her and she took extra pains in checking the writings inscribed thereon. He was categorical when he said that if Madam Ng Ah Poi @ Ng Siang Kim was not satisfied with the tombstone that he had made for her that tombstone would not be placed on her grave yard. Through this witness the defendant sought to establish that that tombstone with the Chinese characters inscribed on it had the stamp of approval of Madam Ng Ah Poi @ Ng Siang Kim before she died. He further testified that he did not know the connections of those names inscribed on the tombstone with Madam Ng Ah Poi @ Ng Siang Kim. He stated that he was not related to that lady. Under cross-examination, this witness said:

(1) saya tidak tahu talian sebenar nama-nama yang dinyatakan di atas batu nisan itu;

(2) saya ukir mengikut apa yang wanita tua itu telah beri kepada saya;

(3) betul apa yang saya buat menurut tempahan wanita tua itu. Saya pun tidak pernah kenal wanita tua itu sebelum beliau di perkenalkan kepada saya; and

(4) saya tidak pernah kenali cucu cicit wanita tua itu tetapi saya jumpa anak lelaki Cina itu sekali. Sebenarnya wanita tua itu hanya tunjuk anak lelaki nya kepada saya. Saya pun tidak kenal suami kepada wanita tua itu.

Finally, under re-examination, the tombstone maker testified that the old lady did explain to him the relevance and the connections of those names to him. But this witness did not elaborate further.

A lecturer in the University of Malaya by the name of Wong Yoke Nyen (f) gave evidence (SD3) for the defendant. She lectured at the Chinese Department of that university and according to her she acquired her BA (Hons) from the same university in Chinese studies with a second class upper two division in 1975. On 20 June 1981, she acquired her Masters degree from the same University. She testified that she was well versed in Chinese culture and she knew how to write Chinese characters. She explained that she did a dissertation on Malayan Chinese for her Masters with an interesting topic entitled: 'The role of Chinese organisation in Malayan politics.' She said that she was familiar with the practices of the Chinese people especially in the fields of social practices, births and deaths. She was frank when she said that 'tombstone' was not her forte and that the subject of tombstone was not related to her research. Nevertheless, she said that she had lectured on Chinese culture which included the subject of tombstone. Finally, she said that tombstone is part of Chinese culture of which she is familiar. She testified that the Chinese tombstone is a memorial which records the ancestors particularly the parents and the grandparents of the family. It relates to the family tree. Some tombstones would include the descendants but some would not. In Chinese culture the basic unit is the family nucleus. She was blunt when she said that Confucianism has no place in modern society. She stated that in Malaysia, the Chinese populace inhabited the Old Folks Home — a trend that showed non-allegiance to Confucianism. Respect for the elders led to ancestral worship. The Chinese pray to their ancestors so that they will be blessed with good fortune. But she said that the practice of ancestral worship is fading in Malaysia as the Chinese people have been Malaysianised. On tombstone, she said that certain tombstones would show a list of descendants; this would in turn reflect the family tree. She said that it is not mandatory to list down the names of the descendants in the tombstone. It would be very subjective, according to her, whether the deceased would be interested in putting the name of the adopted child in the list of descendants, and if this was not done no one would object to it. Although it is subjective, it is not a very common practice of putting an adopted son or an adopted daughter in the list of descendants. She said that if the tombstone is silent as to whether the son or daughter is adopted then the general rule would be that the son or daughter is considered as the natural child of the deceased. She further said that the tombstone is not very big and it is not possible to list all the beneficiaries therein. On a multi-racial note, she testified that it is very common for Chinese families to marry off their daughters to Muslim families and their Muslim grandchildren would be considered in the list of beneficiaries. It is also a practice according to her to mention in the tombstone whether the son is adopted so as to maintain the family tree. But she put a caveat when she said that there are exceptions to this general principle.

In regard to the photograph at 'D10', she admitted being shown that photograph and arising out of that she said that she prepared the diagram and the explanations thereto at 'D10A'. She elaborated that at

columns 5 and 6 of 'D10A', the names of the deceased persons were inscribed therein. She said that the tombstone was a joint tomb of a husband and wife and that columns 5 and 6 of 'D10A' are larger than the rest as it contained the names of the husband and wife. Columns 9 and 12 of 'D10A' itemised the son and grandson's names. Under column 13 of 'D10A', the name 'Lee Liang (Li Liang)' appeared and that both 'Lee' and 'Li' were said to be Teochew pronunciations. Surprisingly this witness stated that she had consulted her Teochew friends and she was told that 'Li Liang' is more standardized and that it refers to the middle name. She said further that in column 13 of 'D10A', 'Lee Liang' should be the natural grandson of Beh Ah Ding. It could be a reference to an adopted grandson. She then went on a hypothesis that if 'Lee Liang' in column 13 is the adopted son of Heng Meng in column 10 of 'D10A', then there is a possibility that 'Lee Liang' is also the adopted grandson of Beh Ah Ding. The chances are there according to her but it would be unlikely. When told that the tombstone was made during the lifetime of Madam Ng Ah Poi @ Ng Siang Kim, this witness testified that there is a likelihood that an adopted son be incorporated therein. On this basis, it is said that Lee Liang is the adopted son of Heng Meng. She said further that there is also a possibility that Lee Liang is also the adopted grandson of Beh Ah Ding. Then again in another breath she said that the Chinese in Malaysia are not so strict in their cultural attachment. In regard to column 4 of 'D10A', she could not explain the date 1 May 1881 appearing therein and she said that it was quite ambiguous. It being a common tombstone she said that she could not make out whether it refers to the date of birth of the mother or the father.

Under cross-examination, the lecturer agreed that there are no hard and fast rules regarding the names listed in the Chinese tombstones in Malaysia. She said that the Chinese tombstone in this case as reflected in the photograph at D10 is very unusual as it refers to an adopted grandson. She agreed that the tombstone in this case is an exception to the general rule. She testified that the deceased can request a particular name to be incorporated in the tombstone. It is possible according to her, for the deceased to request the adopted son's name to be listed in the tombstone. It is also not a mandatory requirement that the word 'adopted' be incorporated in the tombstone. It can happen but chances are very slim. She proceeded further and she said that in the Malaysian context, like in the present case, before the death of Madam Ng Ah Poi @ Ng Siang Kim she could incorporate an adopted son without mentioning the word 'adopted' in the tombstone to enable that 'adopted' son to inherit her property. She was more to the point when she drove home the message that in Chinese society the 'son' will carry on the surname and history of the family and if the Chinese family were to adopt a son, that adopted son will carry on the tradition of the Chinese family. Consequently, that adopted son will be entitled to inherit the property of his adoptive parent. Again in the context of this case, as Beng Choon Chooi (SP2) had a daughter and when he adopted the plaintiff as his son, the plaintiff is said to be entitled to inherit the

property of Beng Choon Chooi provided Beng Choon Chooi's daughter did not object. She admitted that she had testified in court before in regard to Chinese translations and today before this court, for the first time, she gives evidence on Chinese culture.

Under re-examination, she testified that incorporating an adopted son in the tombstone list of beneficiaries without using the word 'adopted' is an exception to the general rule. She went on to say as a general rule that in Chinese culture, the son could be adopted but not the grandson. Again there are exceptions to this general rule. Finally, she said that in the Malaysian context since Chinese culture is not a religion, all general rules will be accompanied with exceptions.

Now, in regard to the lecturer's evidence it is up to the court to decide whether she is an expert. Although this is the first time for her to come to court and give evidence in regard to Chinese culture yet her evidence has shed some light to some dark corners in the course of interpreting the effect of the inscriptions on the tombstone. This lecturer lectured on the subject of tombstone and whatever evidence she gave in regard to the tombstone of the present case is useful and handy. She can be said to have acquired special skill or experience on the subject of tombstone. It is not an easy task to list the matters that come within the category of expert testimony. The list must surely be long. *Sarkar on Evidence* (13th Ed) at p 518 contains an illuminating phrase which needs reproduction. It is as follows:

> The most comprehensive and accurate rule appears to have been stated in *Muldowney v Illinois* CRR Co 36 Iowa, 472 (cited in *Rogers*, 2nd Ed p 22) thus:
>
> > 'The opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such, that inexperienced persons are not likely to prove capable of forming a correct judgment upon it, without such assistance; in other words, when it so far partakes of the nature of science, as to require a course of previous habit or study in order to the attainment of a knowledge of it, and that the opinions of witnesses cannot be received when the inquiry is into a subject matter, the nature of which is not such as to require any particular habits of study in order to qualify a man to understand it. If the relations of facts and their probable results can be determined without especial skill or study, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury.'

It is germane to mention here that the law does not permit any assumption on the competency of a witness who appears as an expert; the party calling him must prove that he is an expert on the subject. For this purpose, the defence must elicit the necessary answers pertaining to the qualifications and experience of the witness (*Raj Kishore v State* [1969] Cr LJ 860 at p 871); 1969 AIR 321 Cal). Where it is not established by the party examining that witness that that witness is specially skilled in the particular science or that he has experience in that particular branch, then that witness cannot be called an expert and

his evidence is not admissible under the law (*Central Excise Department v Somasundaram* [1980] Cr LJ 533). A

In the context of the lecturer's evidence, I must not forget that her opinion as an expert must be supported by reasons and it is the reasons and not ipse dixit which is of importance in assessing her opinion (*Palaniswamy v State* [1968] Cr LJ 453 at p 465; 1968 AIR 127 Bom; 68 Bom LR 941; (1967) Mah LJ 25; and (1968) Jab LJ 610). Her reasons provide a valuable guide to the parties and to the court in testing the value to be attached to her opinion. A court may not rely on the evidence of an expert if the evidence of the expert is not supported by reasons (*Haji Mohd Ekramul Haq v State of West Bengal* 1959 AIR 488 SC; (1959) (Supp) 1 SCR 992; (1959) SCJ 443; and *Central Excise Department v P Somasundaram* (supra)). It is however not necessary for an expert to give lengthy reasons in support of his opinion; brief reasons would suffice (*Prem Shanker v State* [1957] Cr LJ 108 at p 110; (1957) 2 Lab LJ 177). The lecturer in the course of giving her evidence brought her 'technical and scientific knowledge to bear' upon the matter which is referred to her while giving her opinion (*Pooran Das v State of Rajasthan* (1982) WLN (UC) 60; and *Ram Prasad v State of Rajasthan* (1982) WLN (UC) 69). I have no hesitation in accepting the lecturer as an expert witness as she came squarely within the principles enunciated above. As an expert her evidence inspires nothing but confidence. She is very vocal and in the Malaysian context all the general rules she attempted to lay down had exceptions. At the end of the day, her evidence gave mileage to the plaintiff. B C D E

Beh Boh Seng @ Beh Cheng (SD4) was the next witness for the defendant. He was not related to the plaintiff and he said that Beh Ah Teng was the grandfather of the plaintiff. He said that he knew the plaintiff and the plaintiff's father who used to work as a lorry driver. He agreed under cross-examination that he did not know the family ties of the plaintiff and whatever he had said was mere assumption only. Under re-examination, he said that he mixed with the plaintiff's family and that he knew them. F

The last witness for the defendant was Ahmad Zakil bin Wahab (SD5), the Penolong Pegawai Daerah Tanah, Taiping. His evidence revolved on the two pieces of lands wherein the two shophouses stood. G

Now, it is the plaintiff's case that Beh Ah Ai was his grandfather. This was amply supported by Beng Choon Chooi (SP2) who testified that his late father was Beh Ah Teng and his mother was Madam Ng Ah Poi @ Ng Siang Kim. Beng Choon Chooi testified that he adopted the plaintiff as his own son and that his father (Beh Ah Teng) was not the grandfather of the plaintiff. Beng Choon Chooi's evidence demolished that part of the defendant's case where the defendant alleged that Beh Ah Teng was the grandfather of the plaintiff. Who could possibly testify to this misconception than Beh Ah Teng's own son in the person of Beng Choon Chooi (SP2)? I hold accordingly, as facts that, firstly, Beh Ah Ai was the grandfather of the plaintiff and not Beh Ah Teng as alleged by the defendant. Secondly, that the plaintiff's name appeared H I

in column 13 of the photograph 'D10' at the instance of Madam Ng Ah Poi @ Ng Siang Kim who had before her death leisurely prepared the list of her beneficiaries and gave that list to the tombstone maker to inscribe on her tombstone. Nobody knows why Madam Ng Ah Poi @ Ng Siang Kim incorporated the plaintiff's name in column 13 of her tombstone. Even the lecturer could not shed light on it. The lecturer was emphatic that the tombstone in the present case was an exception to the general rule.

On equitable principle, it was argued that the defendant's father had expended money on both the shophouses and even the defendant was said to have expended money to renovate the premises in mid-1993. It was sought to rely on *Paruvathy d/o Murugiah v Krishnan s/o Doraisamy* [1983] 2 MLJ 121 (FC) to bring home the point that the plaintiff's father had encouraged the defendant's father to run the motorboat business on these two shophouses and since there was this encouragement and the expenditures incurred by both the defendant's father and the defendant himself on account of such expectation, a legal relationship was said to exist between the parties. The facts in *Paruvathy v Krishnan* (supra) are poles apart from the present one. There the appellant was a holder of a temporary occupation licence (TOL) in respect of a piece of land in Seremban. The TOL was originally issued to her husband, but after his death, the TOL was re-issued to her since 10 September 1974. Two houses were built on the land, one of which was built in 1974 after the death of the appellant's husband. This house is now occupied by the respondent. The appellant claimed that the house was built by her and she gratuitously allowed the respondent to live in it for two months only commencing 20 October 1974 and that she wanted him to vacate the premises by December 1974. When he refused to do so, the appellant through her solicitors sent a notice dated 21 February 1976 to the respondent to quit. As the notice was ignored by him she sued the respondent for delivery of vacant possession of the house and for damages for holding over. The respondent on the other hand defended the suit claiming that he has the right to stay on because, firstly, the house was his which he built at the request and consent of the appellant and secondly, because the appellant executed a document (exh 'D8') in his favour allowing him to live on the land. Salleh Abas CJ (Malaya) (as he then was) held that the principle of equitable estoppel would apply even against a TOL holder. Here, on the facts, Beh Ah Ai was once the registered proprietor of these two pieces of lands wherein the two shophouses stood and because of the failure to pay the quit rents the state government of Perak proceeded to forfeit LM 5266 on 29 November 1950 and LM 5267 in June 1951. From 1954 till 1989, TOLs were issued in favour of the defendant's father's name in regard to these two pieces of lands wherein the two shophouses stood, unlike *Paruvathy v Krishnan* (supra) where the TOL holder wanted to oust the respondent there despite an agreement in writing (D8). Here, there was no agreement of letting the two shophouses to the defendant by the plaintiff. Here, it was the defendant's father and not the defendant himself that held the TOLs on the two pieces of lands. When the

defendant's father died on 7 April 1988, the TOLs expired automatically. This meant that the TOLs issued in the names of the defendant's father for 1989 vide 'D12S' and 'D12V' were invalid. The question to ask here is this: can the defendant rely on the principle of equitable estoppel as against the plaintiff? Here there was no representation nor encouragement by the plaintiff to the defendant to occupy these two shophouses and neither was there encouragement for the defendant to renovate the two shophouses in mid-1993 by the plaintiff. Cross-examinations of these salient points were not made to the plaintiff (*Seng Chong Metal Works Ltd v Lew Fa* [1966] 2 MLJ 63; *Shamsudin v Yap Choh Teh & Anor* [1969] 1 MLJ 26, 28; *Yeoh Cheng Han v Official Administrator* [1972] 2 MLJ 7, 9 (FC); *Foong Gun Mooi v Lim Yeok Soon* [1978] 1 MLJ 218 (FC); and *Pillai & Anor v Indufela Co & Ors* [1980] 2 MLJ 176, 178). In my judgment, lacking these ingredients the principle of equitable estoppel cannot apply to the facts of the present case. For equity to intervene there must be evidence of some inducement or encouragement by the plaintiff to the defendant or some expectation held out by the plaintiff to the defendant on the strength of which the defendant expended money to the two shophouses. As I said there were none here.

The forfeitures of these two pieces of lands by the state government would open an option for the plaintiff to apply for them and this was justifiably done by the plaintiff. Judith Sihombing in her book entitled *National Land Code, A Commentary* (2nd Ed), at p 279 had this to say on forfeiture:

> The effect of forfeiture on title is to cause the land to become State land and able to be alienated. This results in the termination of any dependant interest created by the proprietor or any interest properly claimed against the land through the proprietor.

Thus, when these two pieces of lands were registered in the name of the plaintiff on 14 December 1993, any dependant interest created by the plaintiff or any interest properly claimed by the defendant against these lands through the plaintiff would come to an end.

Rosman @ Osman bin Haji Abdul Rashid v Rosmah Begum bte Bahadur Beg [1993] 1 AMR 919; *Chalmers v Pardoe* [1963] 1 WLR 677; [1963] 3 All ER 552 (PC); *Inwards & Ors v Baker* [1965] 2 QB 29; [1965] 2 WLR 212; [1965] 1 All ER 446 (CA); and *Ramsden v Dyson* (1866–67) LR 1 HL 129 revolved on the expectation that arose out of the encouragement and such encouragement led to an expenditure of money. That kind of expectation did not come out from the plaintiff to the defendant in this case.

The defendant alleged that he had expended money to renovate the two shophouses. He stated the figure at RM50,000 (in Originating Summons No 24–89–94(T)) but he did not say that figure while giving his evidence. For what is worth, not a single sum was quoted as the amount incurred by him in renovating the two shophouses. What about the bills, the receipts for payments of these bills. Surely renovations at

A the cost of RM50,000 require some form of formalities. Where are the agreements to renovate the premises between the defendant and the contractor? These are questions that were left unanswered at the end of the trial. Must the court conjecture for the defendant?

Since the defendant renovated the two shophouses in mid-1993, B he can be said to be nothing but a squatter in the eyes of the law. For on that date, the two pieces of lands wherein the two shophouses stood had been registered in the name of the plaintiff. As a squatter, it is pointless for the defendant to renovate the two shophouses. In *Sidek bin Haji Muhamad & Ors v Government of Perak* [1982] 1 MLJ 313 (FC), HRH Raja Azlan Shah CJ (Malaya) (as HRH then was) speaking for the C Federal Court had this to say:

> In our opinion there is one issue which lies at the heart of this case. It is whether the appellants have a cause of action against the respondents. The answer is obvious. It is beyond doubt that they cannot succeed because they are squatters. Squatters have no right either in law or in D equity (see *McPhail v Persons Unknown* [1973] 1 Ch 447, 456 (CA)). It does not lie in their mouths to assert that they used and occupied the land as squatters.

Now, even if the defendant renovated the two shophouses as a TOL holder he could not seek compensation from the plaintiff. On this E point, I am fortified by a passage appearing in the judgment of Ajaib Singh J (as he then was) in *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 especially at p 11 where his Lordship said:

> But in no circumstances however can a person who has occupied land on a temporary occupation licence acquire a right to be compensated by a subsequent holder of a temporary occupation licence of the land or by a F subsequent registered proprietor thereof under qualified or final title for any expense that he might have incurred over the land during the period in which he occupied it under a temporary occupation licence.

On the question of the failure of the plaintiff to give any notice to the defendant to quit the land, one must ascertain the relationship between G both parties. The defendant as a trespasser to the two pieces of lands wherein the two shophouses were built is not in a position to bargain but as a bare licensee, the plaintiff has through his solicitor Messrs WK Yap, Loo & Co dated 28 December 1993 gave notice to the defendant to deliver up vacant possession (see exh 'BLL 2' of encl 3 in Originating H Summons No 24–89–94(T)). And again, assuming that the defendant was a licensee, on the authority of *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404 (SC) especially at p 409 the service of the originating summonses to the defendant was sufficient notice of termination of the licence.

Next, it was argued that there was fraud perpetrated by the plaintiff I in acquiring titles to the two pieces of lands wherein the two shophouses stood. It seems that the reliance by the plaintiff that Beh Ah Ai was his grandfather and, consequently, the plaintiff relied on that relationship to ground his claim to the titles to both these two pieces of lands was

said to be the fraud perpetrated by the plaintiff. Beng Choon Chooi (SP2) testified favourably for the plaintiff and to recapitulate the salient evidence once again :

(1) Beh Ah Ai was the grandfather of the plaintiff;

(2) Beh Ah Teng (Beng Choon Chooi's father) was not the grandfather of the plaintiff;

(3) the plaintiff's name appearing on the tombstone of Madam Ng Ah Poi @ Ng Siang Kim did not convert the plaintiff to be the grandson of Beh Ah Teng. On the contrary, at column 13 of photograph 'D10' he is entitled to the share of the estate of Madam Ng Ah Poi @ Ng Siang Kim;

(4) the plaintiff is the adopted son of Beng Choon Chooi (SP2) as the Chinese believe that 'anak lelaki penyambung warisan';

(5) when the plaintiff applied for the two pieces of lands he must have realised the position of the defendant's father as a TOL holder. But this mere knowledge cannot in law amount to fraud. As Mason CJ and Dawson J observed in *Bahr v Nicolay* (1988) 78 ALR 1, especially pp 5–6:

> There is no fraud on the part of a registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest ... . fraud is [not] confined to fraud in the obtaining of a transfer or in securing registration.

As to the meaning of fraud, I need to rely on what Chan J (as he then was, now JCA) said in *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54 where his Lordship observed that 'actual fraud must be proved in order to defeat the indefeasibility provision of the statute. It has to be actual fraud and not constructive fraud.' That fraud must be actual fraud is now well crystallized as knowledge of the prior interest is not fraud.

In *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 (FC), the registered proprietor executed two charges over the land in favour of the appellant, both of which were registered. The chargor was a land developer who had contracted with the second to seventh respondents to build houses on individual lots. On default under the charge, an order for sale was made. The respondents appealed against the order, and the matter was referred bank to the High Court. The purchasers opposed the order for the sale on the basis that the chargee should have inquired to see if they had interest in the land. The High Court said that as the respondent had constructive notice due to the failure to examine the land, the chargee's title was indefeasible. However, on appeal it was held that fraud is a question of fact in the circumstances of the particular case, and the onus of proof is that beyond reasonable doubt. Constructive notice of beneficial interest was not of itself fraud. Abdul Hamid FJ (as the Lordship then was) delivered the judgment of the Federal Court. This is what his Lordship said:

> On the authorities referred to, it is clear therefore that the question of existence or otherwise of fraud is one of fact to be determined in the light of the facts and circumstances surrounding each particular case. The onus is upon the person alleging fraud to prove fraud not on a balance of probabilities but beyond reasonable doubt (see *Saminathan v Pappa* [1981] 1 MLJ 121 at p 123 citing *Narayanan v Official Assignee, Rangoon* [1941] AIR PC 93).

In another part of his judgment, his Lordship Abdul Hamid FJ (as he then was) said:

> The learned judge did hold that the appellant had constructive notice but had failed to make any finding that there was fraud committed by the appellant prior to or at the time of registration to which he was a party or privy. The only finding by the learned judge that there was constructive fraud was when he held that the appellant's demand for sale of the land on the face of such notice was unconscionable. The demand for sale was subsequent to the registration and could not therefore have constituted a fraud of the kind envisaged by s 340 of the National Land Code. To prove fraud the court must be statisfied that the circumstances in which the appellant obtained registration of the charge were such that they constituted fraud. The onus is on the respondents to establish fraud of the chargor (first respondent) to which the appellant was a party or privy and it ought to have been committed prior to or at the time of the registration of the charge. The fraud complained of must be that which resulted in registration of the chargee, ie the fraudulent party. And to render the interest of the registered owner of the charge defeasible the fraud must be brought home to him. Although the learned judge had not made any such finding, we are entitled nevertheless to consider whether, if any, there was fraud.

What was the known existing right of the defendant to the two pieces of lands wherein the two shophouses stood? The answer would be that of a trespasser, a squatter simpliciter. Thus, when the plaintiff succeeded in transferring the two pieces of lands to his name it cannot be said that '... the designed object of a transfer be to cheat a man of a known existing right ...' (per Lord Buckmaster in the Privy Council case of *Waimiha Sawmilling Co v Waione Timber Co* [1926] AC 101).

Now, upon registration of the title the plaintiff in whose favour the registration has been effected, will obtain an indefeasible title to or interest in the land (s 340(1) of the National Land Code), that is to say, a title or an interest which is free of all adverse claims or encumbrances not noted on the register (see *Majlis Amanah Rakyat (MARA) v Tam Seek Hong* & Ors [1994] 2 AMR 1296). Bluntly put, the effect of registration is to defeat all prior unregistered interests. His Lordship Ali Hassan Ag CJ (Malaya) (as he then was) in *Teh Bee v K Maruthamuthu* (supra) described the effect of registration in this way:

> There is also another much more important reason why this appeal should be allowed. Under the Torrens System the register is everything. So said SK Das on page 102 of his book on the *Torrens System in Malaya*. I need only refer to two Privy Council cases, *Creelman & Anor v Hudson Bay Insurance Co* [1920] AC 194 and *Alan Frederic Frazer v Douglas Hamilton Walker* [1967] 1 AC 569 which decided to the same effect.

In *Creelman & Anor v Hudson Bay Insurance Co* which was an appeal from British Columbia, Lord Buckmaster delivering the judgment of the Judicial Committee said on p 197:

> 'Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in s 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.'

In *Alan Frederic Frazer v Douglas Hamilton Walker* which was an appeal from New Zealand, Lord Wilberforce said on p 580:

> 'It is in fact the registration and not its antecedents which vests and divests title.'

In *Fels v Knowles* 26 NZLR 604, 620 it was stated that:

> The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world.

From the several TOLs held by the defendant's father and tendered by the defendant, an inescapable impression one has of the defendant is that he thought that those TOLs would vest him titles. The same sentiment was expressed some 30 years ago in the case of *Papoo v Veeriah* [1965] MLJ 127 where Good J had this to say:

> The public, however, apparently continue to treat land held under temporary occupation licence as if such a licence was capable of transferring some kind of title to the holder and as if it conferred upon the holder a right to deal on land, or in things attached to the land, which comes to the same thing, as if it was land held in the ownership of the licence holder.

With the death of the defendant's father, the TOL died with him. Good J in *Papoo v Veeriah* (supra) said that: 'The licence is personal to the holder; it dies with the holder. If the collector of land revenue in exercise of the powers delegated to him by the Ruler-in-Council chooses to issue a fresh licence to a legatee or a next-of-kin that is a matter entirely in his discretion.'

For the reasons adumbrated above, I granted the plaintiff's application in encl (3) of Originating Summons No 24–88–94(T) with costs. I too allowed the plaintiff's application in encl (2) of Originating Summons No 24–89–94(T) with costs.

Plaintiff's application allowed.

Reported by Lindy Course